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ROBERT M. COVER'S NOMOS AND NARRATIVE

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Let a Thousand Nomoi Bloom? Four Problems with Robert Cover's *Nomos and Narrative*

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Abstract

Robert Cover's well known article *Nomos and Narrative* is a passionately argued defense of a new way of applying narrative to the philosophy and understanding of law. In my article, I argue that there are four major problems which lie at the heart of Cover's analysis. Each problem addresses a major area of his overall view of law. I try to demonstrate that in each case, if the problem is real, Cover's view of law should be rejected. The primary difficulty is analytical and argumentative sloppiness in Cover's arguments. My conclusion is simple: Cover's view of law is both underdeveloped and theoretically unsafe. It falls victim to each of the four problems I identify. As a result, his philosophy of law should be rejected *tout court*.

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Introduction

The use of narrative in our thinking about the philosophy of law has been an exciting and fruitful development over the last couple of decades. Robert Cover's well known article, *Nomos and Narrative,* is a passionately argued defense of a new way of applying narrative to the philosophy and understanding of law.[1] It is, then, little wonder that it has attracted wide attention since its original publication in the *Harvard Law Review* in 1983.[2] That said, I think there are four major problems which lie at the heart of Cover's arguments in *Nomos and Narrative*. In this article, I will simply spell out what I take to be these problems. The primary difficulty is analytical and argumentative sloppiness in Cover's arguments. This article will attempt to lay bare this difficulty. To the extent that these arguments fail to overcome these problems, we should then follow Cover's arguments more circumspectly, if at all. Indeed, we might even go one step further and conclude that Cover's legal philosophy is unsuccessful as a theory of law.

Problem One: How Do I Know a Nomos When I See One?

Cover tells us that a nomos is "a normative universe" that we each inhabit.[3] No one lies outside a nomos. Also, Cover identifies a plurality of nomoi as existing. Each nomos is itself inherently meaningful and "determined by our interpretive commitments."[4] Cover adds that "many of our actions [can] be understood only in relation to a norm."[5] Thus, each nomos has for itself its own means of normative evaluation. Different nomoi may reach different conclusions about the same set of circumstances because of different values and different means of evaluating these values. It must be said from the very outset that Cover offers no arguments whatsoever in support of these broad assertions of fact. He simply claims nomoi exist and that each nomos is identifiable by a number of characteristics. It appears that his wider, implicit strategy is to convince skeptics in the end, rather than in the beginning. That is, he seems to think that *if* we grant any number of boldly made assertions and *if* his final analysis of law is convincing, then we will not be troubled by the great leaps that his article starts off from. I believe this a rather poor strategy to adopt. In this section, I will challenge his views on how a nomos might construct reality socially.

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[1] Robert M. Cover, *Nomos and Narrative*, 94 HARV. L. REV. 4 (1983).
[2] *Id.* is referenced in 957 articles on Westlaw (as of 20 August 2005). It is also reproduced in M. MINOW, M. RYAN, & A. SARAT (EDS.) NARRATIVE, VIOLENCE, AND THE LAW—THE ESSAYS OF ROBERT COVER 95 (1992).
[3] Cover, *supra* note 2, at 4.
[4] *Id*. at 7.
[5] *Id.* at 7-8.

Each nomos is a social construction of reality, of how we understand the world.[6] This is not an uncontroversial view and, in fact, I am generally in favor of the view that many—although perhaps not all—meanings we attribute to the world are meanings we create and project onto the world. However, Cover has a more specific understanding of the characteristics of a social construction of reality entailed by any nomos.

For one thing, this social construction need not entail a state: "the creation of legal meaning … takes place always through an essentially cultural medium."[7] While it may be difficult today in light of the proliferation of states to imagine law apart from the state, it is certainly true that many cultures, not least many Native American tribes, lived within a system of laws, yet they inhabited nations, not states. In addition, for Cover, the social construction of reality is precisely that: "collective or social."[8]

Cover notes that the social construction of a nomos can take one of two general forms. The first is what he calls "paideic."[9] Cover says:

> "[Paideic] Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgement, the recognition that individuals have particular needs and strong obligations to render person-specific responses … a strong community of common obligations."[10]

The significance of this form of a nomos is that it is simply not a self-correcting normative vision. It is self-congratulatory (i.e., celebratory) and a romantic world that avoids any focus on criticism, of itself or of other nomoi. Nor is it, as Cover notes, "analytic."[11]

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[6] *Id*. at 10.
[7] *Id*.
[8] *Id*. This point is further taken up in Richard Mullender's article in the present symposium. Mullender suggests that John Searle offers something more astringent (namely, "collective intentionality") than Cover's emphasis upon emotion as a driver of communities, most especially paideic communities.
[9] Cover, *supra* note 2, at 12.
[10] *Id*. at 13.
[11] This is one of perhaps many instances where Cover seems to want distance between his views and that of analytic legal philosophy, albeit for reasons not immediately clear to me.

It is rather difficult to imagine any substantiation of this nomos in the world. Every normative community would seem to adhere to some element of self-criticism and have some commitment to self-correction. For example, many "nomoi" in early American history lived within interpretive worlds which accepted, if not embraced, the enslavement of African slaves and the banishment of Native Americans from their traditional lands. Surely, these nomoi have changed and certainly for the better. The African slave trade, and the institution of slave-holding, no longer exist. The many nations of Native American tribes, such as the Pequot, Sioux, and Apache, now inhabit protected lands and enjoy more, albeit highly circumscribed, autonomy in lawmaking. The nomoi that accepted enslavement and banishment were no doubt—at least amongst American settlers and the early colonists—"a strong community of common obligations" to some significant extent.[12] Likewise, the nomoi in contemporary America today are by and large equally strong communities of common obligations.

Cover's analysis here tells us nothing about the development of nomoi. All we are told is that paideic nomoi are essentially self-congratulatory and not critical. Yet, no nomos can be a static entity. Our meanings change all the time. I do not only mean attitudes of white settlers to slavery and Native American rights, but also to welfare programmes, anti-terrorism measures, international aid, immigration as well as asylum policies, monetary policies, and any number of other issues. Do we simply reciprocally acknowledge change? Well, if we do, what explains this? How do we know "particular needs and strong obligations" when we see them, given that different normative communities may understand these things differently? For these reasons, it appears that paideic nomoi do not exist anywhere in the world and may never have existed anywhere. Cover may offer us examples of nomoi, but they are nomoi that exist in Cover's heaven, alone, rather than on our earth. Indeed, Cover's claims seem empirically incorrect.

The second general form that the social construction of a nomos can take is called "world maintaining" as well as "imperial."[13] Cover understands imperial forms of nomos creation in the following way. He says:

> "[N]orms are universal and enforced by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity—upon that which is external to the discourse itself. Interpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that

[12] Cover, *supra* note 2, at 13.
[13] *Id*.

> would make impossible the objective mode of discourse and the impartial and neutral application of norms."[14]

These "imperial" norms simply seem to be inculcated in individuals by the community. This process is not one of everyone reading from the same little red book or the like, such as with Mao's China. Rather, individuals learn their community's norms through a shared, lived experience. Thus, imperial norms possess a strong communitarian character.

Now if this picture is correct, it would appear that individuals would, in fact, have rather strong "interpersonal commitments" to one another.[15] After all, if my personal tie to others is weak and my community's norms "need not be taught" formally in the education system, but, instead, perhaps from neighbor to neighbor, then there seems little reason to think that this system stands any reasonable chance of being sustained. Rather, it would seem that imperial norms are best sustained through the kinds of interpersonal commitments that Cover only grants to paideic forms of nomos-building: "reciprocal acknowledgement … a strong community of common obligations."[16] If I simply do not enjoy this particular form of acknowledgement and recognition from others due to "weak," "interpersonal commitments," then it is impossible to see how imperial norms are able to manifest and sustain themselves.[17]

Of course, Cover does not assume that any old "weak" variety of "interpersonal commitments" will suffice: he notes that these norms must be "effective."[18] My claim here is simply that it seems quite reasonable to suppose that effective inculcation of imperial, "world maintaining" norms is only possible within, at least, a modest communitarian community where there are significant interpersonal relationships between community members. Without such relationships, it would seem that these kinds of commitments must, in fact, be taught formally, contrary to what Cover claims.

I have identified one problem in this section relating to Cover's understanding of nomoi. The problem centers on his conception of how nomoi socially construct reality. The paideic view fails because it simply does not correspond to normative communities in the world. In particular, it is unable to account for any change in a community's norms. The second view, the imperialist, or "world maintaining,"

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[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.

view, fails because it is incoherent. If it is composed of the weak interpersonal commitments Cover ascribes to it, it will be unable to satisfy the characteristics Cover claims that it has.

For these reasons, it is difficult to say how it is that I know a nomos when (or even if) I see one. Neither the paideic nor the imperial picture is successful. What is most puzzling about this state of affairs is that even Cover seems to recognize a genuine problem here. If neither paideic nor imperial social construction of nomoi is believed to do the things he claims, then it is strange he would even make a case for either. In any event, Cover says:

> "Of course, no normative world has ever been created or maintained wholly in either the paideic or the imperial mode. I am not writing of types of societies, but rather isolating in discourse the coexisting bases for the distinct attributes of all normative worlds. Any nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible … [Law] must both ground productive behavior and provide meaning for behavior that departs from the ordinary."[19]

My claim would be this: no normative world can be either paideic or imperial full stop. However, let us briefly look at Cover's move above.

Let us assume that it is possible for a nomos to be less than 100% paideic or imperial, whatever the above reservations. We now discover that while the idea of a nomos is supposed to say something about normative communities that provide social constructions of reality, Cover does not really mean to say that "communities" in any proper sense are actually his subject! If we are not talking about actual communities, then what does an analysis of nomoi offer legal philosophers?

Indeed, Cover's understanding of communities is curious. For him, "communities" somehow exist in a so-called "discourse" rather than with the real world individuals who make them up. It is in this discourse that we can find elements of paideic and imperial social construction. Cover's legal philosophy is a philosophy of law that lacks a real subject, divorced from the real life communities and the laws they live by. That is, Cover offers us a legal philosophy that concerns itself with discursive communities *instead of* actual, real

[19] *Id*. at 14.

life communities. In fact, the two may be radically distinct. We might well wonder why we should make time for a philosophy of law that does not concern itself with actual communities (and their actual laws). His is a peculiar view of *law*, to say the least.

This characterization of Cover is one that has its roots in Richard Posner's criticisms of contemporary legal philosophers. Amongst other complaints, Posner is concerned—and quite rightly, in my view—with the direction of much of today's work in legal philosophy. Specifically, Posner complains that too many legal philosophers offer perhaps moral or even political philosophical points of view, often illuminating and helpful, but more commonly not about law.[20]

In light of this worry, Cover's view is objectionable. For one thing, if no actual normative community in the world can be the subject of paideic or imperial social construction, it is puzzling at best why Cover's picture is an adequate approach to the study of law. And let us not overlook this fact. Cover is writing for the *Harvard Law Review* about a picture of law he believes is convincing. However, law is something that exists—at least in some significant sense—in the world. It is uncontroversial to say "England and Wales have a legal system" or "the United States of America has a legal system." There are many ways of finding out what laws are upheld. Likewise, there are many ways of identifying the several governmental institutions that administer so-called black letter law. There is, of course, more to law than legal institutions and what is written down in judicial statements and legislative enactments. For example, conventional morality and political institutions are also relevant to our understanding of law.

In essence, my worry here is this: Cover does not seem to have the law as his focus. Law is something that states and many non-states enjoy. Yet, Cover claims he is simply writing about something he has isolated in discourse and is not thinking about any particular society or even societies in general. It is, therefore, his job to convince us that the discourse he has found has something useful, identifiable, and relevant to contribute to our understanding of actual laws. Unfortunately, he makes no such effort. All we know is that he has stumbled across a discourse that has no obvious connection to the laws societies have. Hence, his claims seem to be of limited significance (at best) to our study of law.

This complete absence of argument in favor of bold assertion after assertion of facts is again apparent in the passage above. Recall where Cover says: "Any

[20] See, for example,, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990), RICHARD A. POSNER, OVERCOMING LAW (1995), and RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).

nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible."[21] This claim seems to be an argument made in support of a paideic social construction of reality. It is not an argument. Remember Cover's definition of a nomos: it is "a normative universe."[22] Each nomos is both inherently meaningful and "determined by our interpretive commitments."[23] Now look at the passage here. When Cover claims a nomos must contain common meanings, that it must be a kind of normative activity, this is not a defense or even an argument in favor of paideic social construction. It is a simple tautology. Any nomos must have common meanings because it is a normative universe shared by a community. Any nomos is meaningful because, well, that is what Cover says it is. Finally, any nomos is a kind of activity because any nomos is determined by our activities: "our interpretive commitments."[24] Again, Cover offers assertions and here a tautology, instead of arguments. This is an additional reason why I remain unconvinced by his understanding of how a nomos socially constructs reality, whichever path we may choose.

Problem Two: What is the Importance of Interpersonal Recognition?

A second problem is simple to state. In essence, any nomos is possible only in virtue of the fact of some substantive interpersonal commitment. This recognition of individuals as sharing something in common makes possible a normative community and the creation of its shared nomos. What is it about this interpersonal recognition that is necessary for the creation of the meanings that make up a nomos?

Again, as we have seen throughout his article, Cover provides bold assertion after assertion without any adequate argumentation to support his many claims. Nothing different happens in this case. A nomos is a normative community. Normative community is made possible through a kind of interpersonal recognition. Therefore, a kind of interpersonal recognition is necessary to create a nomos. Recognition makes possible the creation of norms. Yet, how does recognition do this? What makes recognition meaningful? And, then, what makes that aspect meaningful as a manner of making recognition meaningful? And so on. It is circular argument. Recognition creates meaning and creates a nomos, which is a world of meaning because the nomos's individuals share recognition. In itself, this tells us absolutely nothing.

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[21] Cover, *supra* note 2, at 14.
[22] *Id*. at 4.
[23] *Id*. at 7.
[24] *Id*.

Cover must tell us what it is about recognition and its ability to create new meanings which allows it to become something important for making meanings. It cannot simply be important because it makes meanings and that activity itself is important, i.e., it is important because it is important. This problem of explaining the foundation of his argument is something Cover seems to think he can avoid. This is a big mistake and a separate, second reason to reject his legal philosophy.

Problem Three: Which Nomos is For Me?

There is a further related problem: which nomos is mine? Do I have a nomos? As we saw above, Cover understands a nomos to be "a normative universe" that each of us inhabits.[25] This universe is socially constructed in either a paideic or an imperial way. I have suggested a number of reasons why this view of social construction is unacceptable.

These meanings are held by individuals, but every individual does not create his or her own nomos.[26] Instead, a nomos is something shared by "communities whose members believe themselves to have common meanings for the normative dimensions of their common lives."[27] For example, Cover says:

> "[W]hichever story the [Supreme] Court chooses, alternative stories still provide normative bases for the growth of distinct constitutional worlds through the persistence of *groups* who find their respective meanings … in … radically different starting points."[28]

Thus, it is groups alone that create a nomos amongst themselves, a particular social construction of reality. Again, this view of a social construction of reality is strictly that: a construction of reality made by a social group, in particular, a normative community.[29] It is "the community," not its individuals, that serves as "the source and sustenance of ideas about law."[30]

The first question here is whether or not I belong to a nomos. I have already tried to prove that neither the paideic nor the imperial ways of socially constructing

[25] *Id*. at 4.
[26] That said, Cover contradicts himself later. (*id.*at 60, 67.) I discuss this at the end of this section.
[27] *Id*. at 15. *See*, *e.g.*, *id*. at 34.
[28] *Id*. at 19 (emphasis added).
[29] *See*, *e.g.*, *Id*. at 10.
[30] *Id*. at 38.

reality are successful. If I am right, then the kind of community to which I belong may well socially construct reality. The problem is that *it will not create a nomos*. Not any normative universe will do: the only kind of normative universe that a nomos inhabits is one that shares in paideic and/or imperial manners of social construction. If neither exists or if I am not a member of either group, let alone both, then I may be in a normative universe, but I am not in a nomos. If either objection succeeds, then Cover's claim that we all inhabit a nomos is false.

While I believe Cover's claim is false, let us suppose, for the purposes of argument, that it is true. We might bring out the weakness of his analysis through reference to an example. That is, let us grant that paideic and imperial social construction are possible. Am I part of either?

I am an analytic, legal philosopher. Not only can the so-called "discourse" I engage in be said to be "analytic," but "critical" as well. This kind of discourse is anti-paideic. Cover claims that paideic discourse is "initiatory, celebratory, expressive, and performative, rather than critical and analytic."[31] My discourse is seemingly the opposite of paideic discourse. This holds even if it is the case that my discourse, like paideic discourse, contains interpersonal commitments "characterized by reciprocal acknowledgement" and the like. This is because the ways in which commitments take effect in each type of discourse diverge at the primordial level. They are either critical and analytic or the opposite.[32] My discourse is, thus, fundamentally at odds with paideic discourse.

The situation is different with regard to imperial social construction. If one thinks analytic legal philosophers are manifestly "world maintaining," then I suppose such philosophers fall within the remit of a discourse. However, I also doubt this to be the case. There is no reason to think all such philosophers, least of all myself, premise our discourse "upon that which is external to the discourse itself" as opposed to internal components of the discourse, teasing out implicit assumptions, re-examining commonly held claims and intuitions, and the like.[33] Furthermore, imperial social construction requires norms that are "universal and enforced by institutions."[34] Many Anglo-American departments of law and philosophy are more inclined to analytic as opposed to postmodern perspectives. Perhaps unsurprisingly, their community of mainstream legal philosophers in either law or philosophy departments inhabit university institutions that might favor analytic over postmodern legal philosophers.

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[31] *Id.* at 13.
[32] *See*, *e.g.*, *id*. at 13.
[33] *Id.*
[34] *Id. at* 13.

Cover's view here seems problematic. For one thing, neither view of philosophy is static. Analytic philosophers today are quite different from the analytic philosophers, particularly the Vienna Circle, of yesteryear. Similar twists and turns can be found amongst postmodern philosophers. It is, therefore, untrue that any particular set of "norms" is enforced by university institutions as such because these norms are in flux; the normative commitments of the community are anything other than set in stone.

But someone might object to the picture I have offered on the grounds that "analytic philosophers" as such do not constitute any actual community. That is, there is no such thing as "a nation of analytic philosophers" or a state composed primarily of such persons. However, this does not defeat my objection, as Cover does not claim his arguments extend to any actual community. Instead, his arguments extend only to a so-called "discourse" that provides some basis for teasing out "distinct attributes" in "normative worlds."[35] It is far from obvious that analytic philosophers—a group of people I perhaps interact with more than any other social group—do not form their own normative community, the kind that can possess its own nomos.

Finally, I should point out that what passes for a "discourse" and its attendant "texts" is anything but clear. A commonsensical understanding of, say, a single statute might be that this statute is itself a single text. It may be read and interpreted differently, of course, but it is one physical, actual thing, nevertheless: a single, particular text. Not so, on Cover's account. In his view, we have as many different "texts" of this single statute as there are different interpretations.[36] But then why claim that there is a multiplicity of "texts" of any single document? It is surely more clear (and precise) to claim instead that every single written document may be interpreted differently. Full stop. Period. Not only is there nothing suspicious about this claim—it is surely a truism—but it is direct and to the point, a virtue I fear Cover avoids intentionally. In speaking of "texts" rather than simply the "interpretations of texts" (which is precisely what he means to say), Cover tries to move us away from the view of law as a particular collection of letters, words, punctuation, and the like, and towards a view which holds that law itself is perhaps sometimes nowhere to be found, buried underneath an avalanche of competing "texts." This is obscurantist nonsense.

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[35] *Id*. at 14.

[36] *See*, *e.g.*, *id*. at 4n4: "Every version of the framing of the Constitution creates a 'new' text." In addition, Cover also talks about mainstream legal texts as "texts of jurisdiction" and opposing interpretations as "texts of resistance." (*id*. at 54.)

Thus far, I have argued that I may not, in fact, inhabit any nomos at all, contrary to everything Cover argues. Now let me provide another set of reasons for thinking that this is the case. As I have stated above, for Cover, groups create a nomos. Each individual does not create her own nomos particular to herself. Each group, therefore, shares in a particular normative world, a world with a particular set of interpersonal commitments and the like. Such a view is not entirely unlike that of many theorists, not least Rousseau, Hegel, Dworkin, and others, who adhere to the position that law gives expression to a general will (*volonté générale*).[37]

The problem with this conception of any group's particular view—as opposed to the position that only the individuals who compose a community, rather than the community *itself*, can possess such views—is captured well in Stephanie Lewis's criticism of Ronald Dworkin's legal philosophy. Lewis argues:

> "Dworkin is not in the business to exhibit the beliefs that people do in fact hold. He is doing jurisprudence, not moral anthropology. But it is important to realise that the truth of the rights thesis depends on the truth of these empirical claims. It relies on moral uniformity, in particular on uniform liberal democratic beliefs. The discovery that people do not in fact have these uniform background beliefs would pre-empt the rights thesis, and bankrupt Dworkin's theory of adjudication."[38]

It is true, as Dworkin is quick to note, that "[m]oral diversity is sometimes exaggerated" and that there is a "degree of convergence over basic moral matters throughout history … both striking and predictable."[39] Nevertheless, moral pluralism poses a significant challenge to both Dworkin's and Cover's legal

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[37] See Ronald Dworkin, *Constitutionalism and Democrac*y, 3 EUR. J. PHIL. 2 (1995); RONALD DWORKIN, LAW'S EMPIRE (1998) AT 168, 189; G. W. F. HEGEL, POLITICAL WRITINGS (1999) at 2, 5; G. W. F. HEGEL, GRUNDLIENIEN DER PHILOSOPHIE DES RECHTS, VOL. 7 (1970) at §§215 Addition, 228 Remark; Richard Nordahl, *Rousseau in Dworkin: Judicial Rulings as Expressions of the General Will*, 3 Legal Theory 317 (1997); Arthur Ripstein, *Universal and General Wills: Hegel and Rousseau*, 22 POL. TH. 444 (1994); and JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS (1997) at 57.

[38] Stephanie Lewis, *Adjudication and Fairness*, 61 AUSTRAL. J. PHIL. 160, 163 (1983). See Chin Liew Ten, *Moral Rights and Duties in Wicked Legal Systems*, 1 UTILITAS 135 (1989).

[39] Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 113 (1996).

philosophies (although I will discuss only the challenge to Cover's thought here).[40]

Cover's view (which is not, I think, unlike Dworkin's view) entails that a community speaks with a particular voice, that it shares a single, coherent vision. It is, after all, "the community" (and not its individual members) that serves "as the source and sustenance of ideas about law."[41] Is this view accurate?

Now, it is true that Cover admits that there might be "some interpretive divergence" within a normative community.[42] Therefore, communities do not speak with one voice only, but one voice *for the most part*. In addition, a political community may contain several competing normative communities.[43] Cover's point is not that a *political* community, such as the United States of America, speaks with a single and unified voice, by and large. Instead, his point is that within the United States there are *normative* communities. These smaller communities can be said to speak with a single voice, albeit each community may have the odd voice of dissent.

One immediate worry is raised by Joseph Raz. He claims quite rightly that not all legal systems recognize conventional morality as a source of positive law.[44] If this is true, then conventional norms may be shared by a community as Cover argues, but it amounts to nothing as a theory of law. Thus, Cover's view will be irrelevant from the standpoint of law *even if his view of a nomos is correct*.

A second worry relates to the strength of recognition amongst a community's members. For Cover, there must be interpersonal commitments at least strong enough to sustain a particular community's nomos.[45] If a society is largely libertarian and lacks such commitments, then Cover's analysis is unhelpful as a theory of law in that context *even if his view of a nomos is correct*.

There are, thus, two worries which demonstrate that even if Cover is correct about what can serve as a nomos, he fails to give us a successful new theory of law. And there is reason to think these worries are real. First, a legal system can only

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[40] For criticisms of Dworkin's alleged moral monism, see Joseph Raz, *Speaking With One Voice: On Dworkinian Integrity and Coherence*, in JUSTINE BURLEY (ED.), DWORKIN ANd HIS CRITICS WITH REPLIES BY DWORKIN 285 (2004).
[41] Cover, *supra* note 2, at 38.
[42] *Id*. at 40.
[43] *Id*. at 43.
[44] See Joseph Raz, *Legal Principles and the Limits of Law*, in MARSHALL COHEN (ED.), RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 80 (1984).
[45] *See*, *e.g.*, Cover, *supra* note 2, at 13.

recognize conventional morality as a source of positive law when such conventions exist. At all points in the formation of American law was there a shared "conventional morality"? I doubt it. Indeed, many laws are not generated by a moral view, but practical necessity instead. Traffic laws exemplify this point. What is "immoral" about driving on the wrong side of the road, driving in the wrong direction on a one way street, or failing to stop at a red light? It may not be the fact that the driver has breached conventions that existed before the traffic lights were erected. This being so, an adequate theory of law must be able to move beyond shared commitments. Cover's theory fails to do this. The theory fails as a result.

Second, many communities in the world may well lack the stronger variety of interpersonal commitments that Cover's theory requires. These communities and their laws sit outside the realm Cover's theory seems to go some way towards explaining. It is, therefore, not a universal theory and it is uncertain which communities and their associated laws it is applicable to, even if it is theoretically sound, something I have attacked for much of this article.

There is, however, a third worry and it relates to the soundness of this particular area of Cover's theory. For most of his article, a nomos is created by a normative community, a community composed of individuals who share in a substantial degree of interpersonal recognition. Yet, Cover is anything but consistent even on this point. Indeed, he suggests that individuals can create a nomos for themselves.[46] On this subject, he says: "Judges are like the rest of us. They interpret and they make law."[47] Moreover, on Cover's account, judges are no better than the rest of us at creating normative worlds. Rather, they are simply "like the rest of us."[48] You and I, as well as judges, can interpret and create laws *for ourselves*. And, this being so, every person can fashion and inhabit a unique nomos.

Cover's position here gives rise to a number of difficulties. For one thing, it is outright false to say that I—a philosophy lecturer—can, in the same way as a professional judge, make laws. My opinions on legal cases may well be published in academic journals and books, appear on Westlaw, and the like. However, my opinions cannot (unlike those of a judge) become precedents. I do not know what motivates Cover to make this straightforwardly false claim.

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[46] Cover says: "The meaning judges thus give to law, however, is not privileged, not necessarily worth any more than that of the resister they put in jail." (*id*. At 60.)
[47] *Id*. at 67.
[48] *Id*.

Nevertheless, if I can create law like a judge, it is something that I am able to do. In this example, Cover does not reference the community: the judge is a person who undoubtedly is said to inhabit a nomos, but the judge decides for himself the merits of the case and what the law requires. The interpersonal recognition he receives does not appear to do any work, at least as Cover explains the matter in the relevant passages of his essay. This flatly contradicts about everything he has said thus far on how law and its meaning is created and maintained. The two views are incompatible and, thus, Cover's analysis is, at the very least, theoretically unsound.

Problem Four: How Do We Choose Between Competing Interpretations?

For Cover, the meaning of law is "essentially contested," a simple truism.[49] However, this contestation is thought to be "uncontrolled" in character.[50] By this, he seems to mean nothing more than the fact that no single interpretation of law and its meaning has priority over other interpretations. For example, Cover says:

> "I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status *equal (or superior)* to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge."[51]

The judge's interpretation of law is equal (and perhaps inferior) to the interpretation of law offered by the small normative community of Mennonites. Cover calls us statists if we privilege the judge's interpretation above that of the Mennonites.[52] In addition, Cover says:

> "[T]he statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity … The position that only the state creates law thus confuses the status of interpretation with the status of political domination."[53]

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[49] *Id*. at 17.
[50] *Id.* at 18.
[51] *Id*. at 28 (emphasis added).
[52] *Id*. at 29. *See*, *e.g.*, *id*. at 60.
[53] *Id*. at 42-43.

Cover's view that any and all legal interpretations of non-judges are equal with those of judges seems straightforwardly false to me. For one thing, the Mennonites and other normative communities may well lack the legal training and experience that a professional judge has attained. While judges may well get decisions wrong, there seems every reason to think that, on average, they do much better than those who lack such training or experience. If this were not so, I would expect Cover to argue next that we should close all the law schools. After all, what do they teach of any value if the education provided does not equip those who receive it to interpret the law any better than the man on the street who never has a day of legal education in his life? Moreover, I find use of the epithet "statist" for those who might side (all things considered) with a judge's opinion rather than that of an untrained member of the public rather disturbing—and I say this as one known to be a vociferous proponent of the jury trial.[54] In this section, I will try to demonstrate that Cover's view is false.

Let us imagine that England and Wales has at least two nomoi. The first nomos is composed of the vast majority of citizens who use English in their everyday lives. This nomos is dominant numerically and politically: its normative commitments are enshrined in the laws of England and Wales, written in English.

The second nomos is a group of persons previously unknown. They share everything in common with the first nomos except their size (they are a small minority) and their normative commitments (they are a distinctly different nomos). There is also one additional respect in which they differ. The second nomos speak and write in Aenglish: it reads and sounds like perfect English to someone fluent in English. However, its meaning is radically different for those fluent in Aenglish. This is because the same words have radically different meanings in each of the languages.

Now suppose that these two normative communities dispute the meaning of an English and Welsh law. For English speakers, the law's common interpretation is that murder is prohibited. A member of the Aenglish community transgresses this law, is tried by the Crown Court, and is given a life sentence. The Aenglish individual's solicitor attempts to appeal the conviction on the grounds that, to the Aenglish community, English and Welsh law does not prohibit murder *as the Aenglish community read it* (recall they read the laws in Aenglish, not English). English and Welsh law does prohibit murder as the English speakers read it.

[54] For example, see Thom Brooks, *The Right to Trial By Jury*, 21 J. APP. PHIL. 197 (2004); Thom Brooks, *A Defence of Jury Nullification*, 10 RES PUBLICA 401 (2004); and Thom Brooks, *On Jury Nullification*, 97 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 169 (2005).

Should the Court of Appeal or the House of Lords find in their favour if the case is appealed?

I use this example in an attempt to make explicit everything that is incorrect about Cover's view. Here the English and the Aenglish have competing interpretations of law. In fact, they are diametrically opposed. What reason do we have to think that the majority nomos composing the vast majority of England and Wales, and enshrined in English and Welsh law, should do "violence" to this poor Aenglish soul, someone who has the misfortune to traipse around in a different, competing nomos?

The answer is simple. The Aenglish individual should be imprisoned because he broke the law prohibiting murder. It does not matter that he speaks a different language or has a different value system. To accept the contrary view would be to accept that we should not apprehend and punish a serial arsonist on the grounds that she is a part of a particular modern witch community or is newly arrived from a different country where it is customary to set fire to the property of others. Would Cover claim this? Well, he certainly associates "the ultimately true interpretation of law" with everyday adjudication. Moreover, let us remind ourselves of a passage quoted earlier. Cover says:

> "[T]he statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity … The position that only the state creates law thus confuses the status of interpretation with the status of political domination."[55]

Cover may well be right to suggest that in two thousand years' time we may all come to a new and improved understanding of the First Amendment or The Prevention of Terrorism Act 2005 than we have at present. In addition, it may well be the case that some professors may well make better judges in particular cases than the judges who sit in court today. This is a strictly epistemological claim about knowing how to choose best between competing interpretations—and it contains a number of ifs, ands, buts, and the odd however as to how we might perform this task. Nevertheless, many of us working in legal philosophy today may agree that some super-duper, true-for-all-time interpretation of any aspect of law is impossible to know when you have stumbled upon it; or it is very possible

[55] Cover, *supra* note 2, at 42-43.

a non-judge will have a better argument for a decision contrary to what the courts have done and yet continue to remain far from persuaded by Cover's claims.

Cover's analysis does not tell us what we should do when we must decide cases. He seems to suggest the view that we should simply "let the best narrative win," but even this does not work and is unsuccessful. As we have seen, each nomos has its own set of values. Cover tells us that the merits and demerits of various plans of action are all determined by what the normative values are within our nomos. Each nomos has different rules for assessing the same set of circumstances. If each nomos has different rules, then the judgments of different nomoi may well not overlap. No one can say whether one narrative is more correct than another. If you have a legal dispute, all you can hope for is that both parties belong to the same nomos—and even this may not work, as in some cases Cover claims that individuals can make their own nomos for themselves as well.

And what is so bad about being a statist? After all, Cover is supposed to be saying something *about law*. Law is something defined and administered largely by states, although not in every instance. It is true that states sometimes get the law wrong. But a good argument in a dissenting opinion remains part of the legal record. It does not disappear. All is not lost. Seemingly, only statists have a theory about conflict resolution that is practical and sustainable, whatever its many defects. Here, Cover's view does not get off the ground. This is because it has yet to land on earth.

A final point is worth raising. Interpretations can be wrong. Imagine a student in a class on Plato's *Republic* arguing that Plato was a vociferous advocate of democracy.[56] When advised that this view is false because Plato is rather explicit about his preference for philosopher-kings and his disdain for democracy, the student replies: "Well, Dr. Brooks, that is only *your* interpretation—and here your view is *different* from my interpretation. Please don't *privilege* your view above mine: after all, *that would be academist*!" Such a claim would never be treated seriously by any intellectual, let alone any decent Plato scholar. Yet, it is the kind of claim Cover seems to ask us to entertain. This is an absurd view to defend.

[56] See PLATO, REPUBLIC (1992) at Book VIII; Thom Brooks, *Knowledge and Power in Plato's Political Thought*, INT. J. PHIL. STUD. (forthcoming); and Thom Brooks, *Plato, Hegel, and Democracy*, BULL. HEGEL SOC. GREAT BRITAIN (forthcoming).

Conclusion

Robert Cover ends *Nomos and Narrative* with this statement: "We ought to stop circumscribing the nomos; we ought to invite new worlds."[57] In essence, his cry is "let a thousand nomoi bloom!" I have raised four problems with respect to *Nomos and Narrative*. Any one of these problems raises serious concerns about the value of Cover's analysis. We should, therefore, look beyond *Nomos and Narrative* for a more plausible account of law.

[57] Cover, *supra* note 2, at 68.